Supreme Court, U. S.
FILED
JUN 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2082

DENNIS ANNICARO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT.

EDWARD M. KAY
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IN THE

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QUESTION PRESENTED

WHETHER AN ARREST IS CONSTITUTIONAL WITHIN THE MEANING OF THE FOURTH AND FOURTEENTH AMENDMENTS WHERE IT IS BASED UPON AN ARREST WARRANT ISSUED IN ONE STATE BUT SERVED IN ANOTHER STATE.

OPINION BELOW

The opinion of the District Court of Appeal, not yet reported, appears in the Appendix hereto. (A. 1-4). No opinion was rendered by the Supreme Court of Florida.

JURISDICTION

The decision of the District Court of Appeal for the Fourth Circuit was entered on September 26, 1979. A timely motion for rehearing was denied on October 24, 1979. The Supreme Court of Florida denied to accept certiorari jurisdiction in this case on April 30, 1980, and this petition for certiorari was timely filed within sixty (60) days of that date pursuant to revised Rule 20. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 941.14, Florida Statutes (1977):

"914.14 *Arrest without a warrant.* - The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding 1 year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant."

Section 901.19, Florida Statutes (1977):

"901.19 *Right of officer to break into building.* (1) If a peace officer fails to gain admittance after he has announced his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, he may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be."

STATEMENT OF THE CASE

I.

GENERAL BACKGROUND

Dennis Annicaro was convicted upon trial by jury in Broward County Circuit Court, Florida for the offense of possession of phencyclidine (commonly known as PCP). From a judgment imposing a five year sentence of imprisonment, Annicaro appealed to the District Court of Appeal of Florida for the Fourth District. That Court affirmed his conviction without opinion, but with Chief Justice Downey writing a dissenting opinion. (A. 1-4). Thereafter, the Supreme Court of Florida declined to accept certiorari jurisdiction of the case.

II.

FACTS MATERIAL TO THE QUESTION PRESENTED

On January 13, 1978, at approximately 6:00 A.M., a number of officers from the Broward County Sheriff's Department went to Annicaro's residence in Broward County, Florida, for the sole and express purpose of arresting Annicaro pursuant to a copy of an arrest warrant issued from the State of New Jersey, Municipal Court of Fanwood, Union County. (A. 6). Pursuant to the New Jersey warrant, Annicaro was placed under arrest at the front door of his residence. Thereafter, the officers entered Annicaro's residence and subsequently observed a brown vial on a table in the kitchen. Although no contraband was

observed at this point, one of the officers thereupon picked up the brown vial, opened it, and observed what he believed to be cocaine contained inside the vial. Annicaro was then placed under arrest for possession of cocaine. However, after it was later determined that the substance discovered was not in fact cocaine but rather phencyclidine (PCP), Annicaro was charged by information with possession of PCP, for which he was subsequently convicted. That conviction is the basis of this petition for a writ of certiorari.

III.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED

Before trial, Annicaro by written motion moved to suppress as evidence the PCP seized at the time of his arrest. In his motion, Annicaro specifically alleged that the search and seizure was not incident to a lawful arrest nor pursuant to a valid search warrant, but rather was exploratory in nature and therefore violative of his constitutional rights under the U.S. as well as Florida Constitutions. (A. 7-8). At the suppression hearing, Annicaro's counsel argued, *inter alia,* that the search and seizure of the PCP was incident to a unlawful arrest and therefore the PCP should be suppressed as being a fruit of that unlawful arrest. (A. 9-57). However, notwithstanding, the trial court denied the motion to suppress evidence.

After conviction, Annicaro appealed to the District Court of Appeal of Florida for the Fourth District. Three points of error were raised on appeal; the first being that the trial court erred in denying the motion to suppress evidence since Annicaro's initial arrest pursuant to the New Jersey warrant

was invalid and, consequently, the PCP seized as evidence was "fruit of the poisonous tree." The District Court of Appeal affirmed Annicaro's conviction without opinion, but with Chief Justice Downey writing a dissenting opinion. In his opinion, Justice Downey stated that since the State never attempted and thus failed to prove the validity of Annicaro's original arrest under Section 941.14, Florida Statutes (1977), this arrest was necessarily invalid and consequently required the trial court to suppress the evidence obtained as a result thereof. (A. 2-4). Hence, in light of the State's complete failure to raise Section 941.14, Florida Statutes (1977), in the trial court as a valid basis for Annicaro's initial arrest, the District Court of Appeal necessarily ruled that Annicaro's initial arrest was lawful within the meaning of the Fourth and Fourteenth Amendments even though based upon a foreign arrest warrant.

Thus, the federal question presented herein has been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Petitioner argues the following reasons why this petition for writ of certiorari should be granted:

1. The decision below conflicts with a decision of this Honorable Court on a similar federal question.

2. The decision below conflicts with decisions of U.S. Courts of Appeals on a similar federal question.

3. The decision below conflicts with decisions of the highest courts of numerous states on a similar federal question.

4. The decision below raises the significant and recurring problem concerning the legality of an arrest based upon an arrest warrant issued in one state but executed in another state.

(a.) The court below essentially decided a substantial and unsettled federal question arising under the U.S. Constitution; or it rendered an erroneous or at least doubtful decision on such a question.

(b.) Even assuming *arguendo* that the court below based its decision on the fact that Petitioner's arrest was made pursuant to F.S. §941.14, F.S. §941.14 is violative of the Fourth and Fourteenth Amendments in light of this Court's recent holding in *Payton v. New York*, ____ U.S. ____, 100 S. Ct. 1371, ____ L. Ed.2d ____ (1980).

I.

THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT ON A SIMILAR FEDERAL QUESTION.

In *Ward v. State of Texas*, 316 U.S. 547, 62 S. Ct. 1139 (1942), this court was presented with an intrastate arrest situation whereby the sheriff of one Texas County sought to arrest a person located in another Texas County. Speaking through Justice Byrnes, the Court held that the sheriff of one county was without authority to arrest an accused who was located in a different county. More particularly, the Court stated as follows:

". . .There can be no doubt that from first to last the officers acted without authority of law. The sheriff of Morris County had no power to arrest petitioner in Titus County. Without the boundries of Morris County

he had no more authority than any private citizen." *Id.* at 1142.

Analogously and *a fortiori,* the petitioner submits that a state officer seeking to arrest a person solely upon an arrest warrant issued from another state is likewise without any authority to do so. In such a situation, the state officer is beyond the realm of his authority since his power is derived from an arrest warrant issued in a county located in another state.

Consequently, there is conflict between the decision of the District Court of Appeal herein and the court's holding in the *Ward* case, *supra.* This conflict should be resolved at this time by this Honorable Court.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF UNITED STATES COURTS OF APPEALS ON A SIMILAR FEDERAL QUESTION.

The case of *De Parcq v. United States District for Southern District of Iowa,* 235 F.2d 692 (8th Cir., 1956), involved an application by an attorney, who was not a resident of Iowa, for a writ of prohibition to prohibit an Iowa federal district court from holding him in contempt for failure to respond to an order to show cause. The Eighth Circuit Court of Appeals held that since the non-resident attorney was not served with any process within the territorial jurisdiction of the Iowa federal court, that Court had no jurisdiction over his person and could not hold him in contempt for refusing to respond to the order to show cause. This holding was recently cited with approval by Judge Van

Graafeiland in his dissenting opinion in the case of *Fidelity Mortgage Investors v. Camelia Builders, Incorporated,* 550 F.2d 47, 60 (2d Cir., 1976).

Analogous to the *De Parcq* case, the Petitioner contends that since the New Jersey arrest warrant was not served upon him with the territorial jurisdiction of the New Jersey Municipal Court, the New Jersey Court had no jurisdiction over his person by virtue or the arrest warrant. Therefore, the Petitioner could not have been legally arrested in Broward County, Florida, pursuant to the New Jersey arrest warrant, the sole basis upon which the Broward County officers arrested the Petitioner. (A 14-16, 22-23).

In *Kirkes v. Askew,* 32 F. Supp. 802 (E.D. Okla., 1940), the Federal District Court of the Eastern District of Oklahoma, citing numerous state cases for support, restated the general rule that an arrest warrant cannot be executed in another state than that in which it was issued. The Court said as follows:

> "The law of Oklahoma and the law generally is that a warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundries of the state by whose authority it was issued." *Id.* at 804.

In his dissenting opinion in *Jones v. United States,* 342 F.2d 863, 879 (D.C. Cir., 1964), Justice Prettyman of the District of Columbia Circuit Court of Appeals cited with approval the *Kirkes* case for this general principle of law.

Moreover, in the case of *Palmer v. Thompson,* 20 App. D.C. 273 (D.C. Cir., 1902), the District of Colombia Circuit Court of Appeals held that in the absence of an Act of Congress conferring the power, a federal court in one district has no authority to issue its writ to the marshall or any officer of another federal district commanding him to arrest a person

within his jurisdiction, but outside that of the court issuing the writ. The Petitioner submits that this holding lends support to the Petitioner's position that the New Jersey arrest warrant had no force or effect outside the territorial jurisdiction of New Jersey. The officers who arrested the Petitioner based their initial arrest solely upon the New Jersey arrest warrant which they possessed, and not any statutory authority whatsoever. No claim was ever made by any officer involved in the arrest of the Petitioner, or by the prosecutor in the trial court, that the Petitioner's arrest was lawful by reason of any statutory authority. (A. 9-57). Accordingly, under the rationale of the *Palmer* case, *supra,* the Petitioner could not have legally been arrested in Broward County, Florida, pursuant to the New Jersey warrant.

Thus, the Petitioner claims that conflict exists between the holdings in the aforementioned cases and the decision *sub judice,* which conflict should be immediately resolved by this Honorable Court.

III.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE HIGHEST COURTS OF NUMEROUS STATES ON A SIMILAR FEDERAL QUESTION.

In *Passett v. Chase,* 107 So. 689, 691 (Fla. 1926), the Supreme Court of Florida observed as follows:

> "It is too well settled to require citation of authority that a warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundries of the state by whose authority it was issued."

A great number of other state supreme courts have stated or followed this general rule of law. See for example:

ARIZONA - *State v. Everett,* 520 P.2d 301, 303 (Ariz., 1974).

INDIANA - *Martin v. Newland,* 147 N.E. 141, 196 Ind. 78 (Ind. 1925).

IOWA - *Drake v. Keeling,* 299 N.W. 919, 922, 230 Iowa 1038 (Iowa, 1941).

KANSAS - *State v. Dreiling,* 12 P.2d 735 (Kan. 1932).

KENTUCKY - *bowlin v. Archer,* 163 S.W. 477, 157 Ky. 540 (Ky. 1914).

NEBRASKA - *Kendall v. Aleshire,* 45 N.W. 167, 28 Neb. 707 (Neb. 1890).

OHIO - *City of Fairborn v. Munkus,* 277 N.E. 2d 227 (Ohio, 1971).

OKLAHOMA - *Stuart v. Mayberry,* 231 P. 491, 105 Okla. 13 (Okla., 1924).

OREGON - *Carpenter v. Lord,* 171 P. 577, 88 Ore. 128 (Ore., 1918).

TENNESSEE - *Tarvers v. State,* 16 S.W. 1041, 90 Tenn. 485 (Tenn., 1891).

TEXAS - *Ex Parte Sykes,* 39 S.W. 538, 46 Tex. Cr. R. 51 (Tex., Crim. App., 1904).

See also:

5 Am. Jur. 2d, Arrest §20

Perkins, *Law of Arrest,* 25 Iowa L. Rev. 233 (1940).

Annot., 61 A.L.R. 380 (1919).

In light of the foregoing authorities, it is clearly evident that the decision *sub judice* not only conflicted with the well-established case law of the State of Florida, but also the well-established decisions of many of the highest state courts throughout the land. This clear and fundamental conflict requires immediate resolution.

IV.

THE DECISION BELOW RAISES THE SIGNIFICANT AND RECURRING PROBLEM CONCERNING THE LEGALITY OF AN ARREST BASED UPON AN ARREST WARRANT ISSUED IN ONE STATE BUT EXECUTED IN ANOTHER STATE.

A. THE COURT BELOW ESSENTIALLY DECIDED A SUBSTANTIAL AND UNSETTLED FEDERAL QUESTION ARISING UNDER THE UNITED STATES CONSTITUTION; OR IT RENDREED AN ERRONEOUS OR AT LEAST DOUBTFUL DECISION ON SUCH A QUESTION.

Each day arrests of individuals in the United States are made based upon warrants issued in foreign states (i.e.-states different from that in which the warrant is executed), as was the case *sub judice.* However, notwithstanding, this Honorable Court has not yet directly decided the legality of such arrests. Rather, this Court has left the individual state courts and legislatures to decide their legality or prescribe the procedure whereby they may be legal. This abdication by this Court has led to inconsistent and non-uniform results between the various states, and ultimately unequal justice. Depending upon a particular state court decision or state statute, an arrest based upon a foreign warrant may be legal in one state and yet not legal in another. The Petitioner submits that such an inequitable and inevitable consequence is completely avoidable since the problem is essentially *interstate* in nature, and therefore properly addressable by this Honorable Court. Consequently, a decision by this Court is desperately needed in order to eliminate any

possible gross inconsistencies among the states as to arrests based solely on foreign arrest warrants, and to more likely secure equal justice for every person accused of a crime.

As previously stated, in light of the record presented before the court below, that court necessarily decided that arrests based on foreign warrants were legal. As stated above, that decision is of substantial federal importance considering the interstate nature and ramifications which necessarily flow therefrom. Furthermore, that decision is completely contrary to numerous authorities heretofore cited. At the very least, the decision below is doubtful on an extremely important issue to the criminal justice system and to those who fall within its ambit.

B. EVEN ASSUMING *ARGUENDO* THAT THE COURT BELOW BASED ITS DECISION ON THE FACT THAT THE PETITIONER'S ARREST WAS MADE PURSUANT TO F.S. §941.14, F.S. §941.14 IS VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS IN LIGHT OF THIS COURT'S RECENT HOLDING IN *PAYTON v. NEW YORK*, ____ U.S. ____, 100 S. Ct. 1371, ____ L. Ed. 2d ____ (1980).

Recently, this Court held in *Payton v. New York*, ____ U.S. ____, 100 S. Ct. 1371, ____ L. Ed. 2d ____ (1980), that it was unlawful for police to make warrantless and forcible entries into a suspect's home in order to effectuate a routine felony-arrest. This Court struck down as inconsistent with the Fourth Amendment New York statutes which authorized police officers to enter a private residence without a warrant and with force if necessary to make routine

felony arrests.

In the situation presented *sub judice,* the record below clearly demonstrates that the officers who arrested the Petitioner acted solely by reason of the New Jersey arrest warrant they possessed, and not by reason of §941.14, Florida Statutes (1977). Similar to the New York statutes involved in *Payton, supra,* §941.14, in conjunction with §901.19, authorizes a warrantless and forcible entry into a person's home providing the police have "reasonable information" that the person has been charged with a felony in anoter state. In light of the *Payton* decision, such a statute is clearly unconstitutional as inconsistent with the Fourth Amendment.

Although there was a want of reliance on §941.14, Florida Statutes (1977), by the police herein, assuming for one moment that the court below based its decision upon its belief that the officer complied with this statute notwithstanding the ineffectual New Jersey warrant, the warrantless arrest of the Petitioner necessarily could not be justified in view of the *Payton* decision. Hence, considering the numerous case authorities previously cited as well as the holding of this Court in the *Payton* case, *supra,* the decision of the court below cannot stand on either any case law or statutory basis.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

/s/ Edward M. Kay

/s/ D. Robert Silber

/s/ Douglas J. Glaid

510 Southeast Seventeenth Street
Fort Lauderdale, Florida 33316
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished the Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 27th day of JUNE, 1980.

KAY AND SILBER, P.A.
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Telephone: 764-0033; 944-1841
Attorneys for Petitioner

/s/ Edward M. Kay

/s/ D. Robert Silber

/s/ Douglas J. Glaid

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT JULY TERM 1979

DENNIS ANNICARO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

CASE NO. 78-1840.

Decision filed September 26, 1979.

Appeal from the Circuit Court for Broward County; Miette K. Burnstein, Judge.

Bernard Berman of Roderman and Berman, P.A., Fort Lauderdale, for appellant.

Jim Smith, Attorney General, Tallahassee, and Joy B. Shearer, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

LETTS and MOORE, JJ., concur.

DOWNEY, C.J., dissents with opinion.

DOWNEY, C.J., dissenting:

Appellant was convicted by a jury of the charge of possession of a controlled substance. From the judgment and sentence he appeals, assigning as the primary errors the failure to grant his motion to suppress and his motion for directed verdict during trial.

The evidence adduced upon hearing of the motion to suppress revealed that the Broward County Sheriffs' De-

partment possessed a New Jersey warrant which charged that appellant "did unlawfully conspire to possess, possess with the intent to distribute, and to distribute controlled dangerous substances, contrary to the provisions of N.J.S.A. 24:21:24." Armed with that warrant, deputies went to appellant's house in Pompano Beach, Florida, knocked on the door and advised appellant they had a warrant for his arrest. Appellant opened the door, was arrested and asked if he could get dressed. The deputies consented and followed him into a bedroom where appellant dressed. Appellant then asked to call a lawyer to which the d eputies consented. They all went into the kitchen where the telephone was located and, while there, the deputies spotted a brown vial next to a mirror and razor blade. One of the deputies picked up the vial, saw a white crystal-like substance therein and arrested appellant again for possession of cocaine.

The state's position at the hearing on the motion to suppress was that the initial arrest, pursuant to the New Jersey warrant, was valid. The officers entered the house while appellant, who was under arrest, clothed himself. They said they knew he had weapons in the house, and while properly in the house they observed the contraband in plain view![1] On the other hand, appellant contended at the suppression hearing that, not only was the contraband not in plain view, but the officers had no right to be in the house because the initial arrest was invalid. Appellant maintains that the deputies had no right to arrest appellant pursuant to

[1]The testimony was that the deputies did not see the contraband in plain view. They saw a brown vial, a mirror and a razor blade; until they opened the vial and looked in they did not know it was contraband. Of course, the juxtaposition of the vial, mirror and razor made them suspect there might be contraband there (T. 29).

the New Jersey warrant.

On appeal appellant submits that a warrant issued in one state for the arrest of a person cannot be executed in another state; it has no validity as a basis for arrest beyond the borders of the issuing state. *Passett v. Chase,* 91 Fla. 522, 107 So. 689 (Fla. 1926). Therefore, under appellant's theory the deputies had no authority to arrest appellant in the first instance.

The state answers the foregoing argument first by pointing to the inadequacy of the record; a copy of the warrant was not in the record. Furthermore, the state seeks to rely upon Section 941.14, Flordia Statues (1977), to justify the initial arrest. That statute provides that a person may be arrested without a [Florida] warrant upon reasonable information that they are charged in the courts of another state with a felony. Therefore, the state concludes that the New Jersey warrant supplied reasonable information that appellant was charged with a felony in another state.

Appellant responds by showing the record on appeal was supplemented by stipulation and a copy of the New Jersey warrant is now available. Secondly, appellant argues the arrest in question was made pursuant to the New Jersey warrant by serving it on appellant with an appropriate return made on the warrant and forwarded on to the New Jersey authorities. The police did not rely upon Section 941.14, Florida Statutes (1977), nor did the state rely upon that authority in the trial court.

I would not hold the reliance on the New Jersey warrant by both the police and the prosecutor fatal if Section 941.14, Florida Statutes (1977), were a valid basis in this case for the initial arrest. However, this record is devoid of any proof that the New Jersey warrant charged appellant with a felony under the laws of New Jersey. It may well be the charge in

question does constitute a felony under New Jersey laws, but that is an element of proof which the state was charged with carrying at the suppression hearing since they arrested appellant without a warrant. I suppose the state never undertook to prove that point because the state's position in the trial court was that the arrest upon authority of the New Jersey warrant satisfied the criteria for a valid arrest. Having changed its tack, the state now finds itself without having adequately proved the validity of the arrest under Section 941.14, Florida Statutes (1977).

It seems to me we need not reach the questionable plain view holding of the trial court because the original arrest was invalid, requiring the trial court to suppress the evidence obtained as a result thereof.

Accordingly, I would reverse the judgment and sentence appealed from.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT

DENNIS ANNICARO,

Appellant,

v. CASE NO. 78-1840

STATE OF FLORIDA,

Appellee.

October 14, 1979

BY ORDER OF THE COURT:

ORDERED that the Appellant's October 8, 1979 Motion for Rehearing or Clarification of Decision is hereby denied; and further

ORDERED that the Appellant's October 8, 1979 Alternative Motion for Stay of Mandate Pending Certiorari Review is hereby granted.

I hereby certify the foregoing is a
true copy of the original court order.

CLYDE L. HEATH,
CLERK

cc: Bernard Berman, Esq.
Attorney General

cms

066391

COMPLAINT

MUNICIPAL COURT OF FAIRWOOD

COUNTY OF UNION

C -

COMPLAINT RESULT OF CASE RETURNED BY PROSECUTOR

PROSECASE (DOCKET) NUMBER C -

The State of New Jersey
vs.

Defendant DENNIS ANNICARO

Address 187 NORTHEAST 21st. STREET

City, State POMPANO, FLORIDA

Complainant INVESTIGATOR LEO J. UEBELEIN of UNION COUNTY PROSECUTOR'S OFFICE

Upon oath I say that to the best of (my) (my) knowledge, information and belief on or about the

between July 17, 1977 and Oct. 31, 1977

day of , 19 , in the Fairwood & other places [illegible] County of Union NJ

unlawfully conspire to possess, possess with the intent to distribute, and to distribute controlled dangerous substances, contrary to the provisions of N.J.S.A. 24:21-24.

Filed in Open Court
ROBERT E. LAZARWOOD, Clerk
BY DEPUTY CLERK
ON JUL 5 1978

Comp. No. 78-381

JUL 5 1978

Charge Number 1 NJS 24:21-24

Charge Number 2 NJS

Charge Number 3 NJS

Subscribed and sworn to before me this day of , 19

Signed (NAME AND TITLE OF PERSON ADMINISTERING OATH)

Signed INV. LEO J. UEBELEIN

To any police officer or other authorized person. Pursuant to this warrant, you are hereby commanded to arrest the named defendant and bring (him) (her) forthwith before this court to answer the foregoing complaint.

A Plea has been filed by on the

No Warrant Issued (Signature of Judge)

Bail Appearance Date Time Judge (Title)

POLICE RETURN

I hereby certify that I served the within warrant by arresting the named defendant and bringing (him) (her)

before on , 19

Signed

COURT CLERK

066391

POLICE IDENTIFICATION OF COMPLAINANT

[illegible]

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA.

CASE NO. 78-381 CF Burnstein

STATE OF FLORIDA	:	
Plaintiff,	:	
VS.	:	MOTION TO
	:	SUPPRESS
DENNIS A. ANNICARO	:	EVIDENCE
	:	
Defendant.	:	

COMES NOW, the Defendant, DENNIS A. ANNICARO, by and through his undersigned attorney, pursuant to Rule 3.190(h) (1) of the Florida Rules of Criminal Procedure and moves this Honorable Court to enter an order suppressing as evidence in the cause alleged contraband, to-wit: PCP, which was seized by agents of the Broward Sheriff's Office, when in fact, said agents were supposedly serving an arrest warrant on the Defendant in the above-styled cause, DENNIS A. ANNICARO, on or about January 13, 1978 at approximately 6:05 a.m. at 167 N.W. 21st Street, Pompano Beach, Broward County, Florida and as grounds thereof, the Defendant would show unto this Honorable Court the following:

1. The facts as best known to the Defendant are set forth in the police report provided to the undersigned by the Sheriff's Department, wherein said report, in synopsis states

on Friday, 13 of January, 1978, at approximately 6:05 a.m., Agent J.A. Leskin served a Felony Arrest Warrant from the State of New Jersey Court of Fanwood, Union County, on subject DENNIS ANNICARO at 167 N.W. 21st Street, Pompano Beach, Florida. After the Arrest Warrant was heard, subject ANNICARO was found to be in possession of suspected Cocaine.

2. That said search and seizure was in violation of the Defendant's Constitutional rights under the Florida Constitution and the Constitution of the United States and the laws as they presently exist in the State of Florida. Said search and seizure was contrary to and in violation of standard procedures provided for by the law.

3. Said search and seizure is not incident to a lawful arrest nor pursuant to a valid search warrant but rather was exploritory in nature and therefore violative of the Defendant's Constitutional rights.

WHEREFORE, the Defendant, DENNIS A. ANNICARO, prays that this Honorable Court entertain this, the Defendant's Motion to Suppress Evidence in this cause at an evidentiary hearing set by this Court prior to or immediately before the trial of this cause.

I HEREBY CERTIFY that a copy of the foregoing was furnished to ROBERT B. CARNEY, ESQ., Assistant State Attorney, 201 S.E. 6th Street, Fort Lauderdale, Florida this 24 day of April, 1978.

KAY, RODERMAN & SILBER, P.A.
510 Southeast 17th Street
Fort Lauderdale, Florida 33316
Telephone: 764-0033

/s/ EDWARD M. KAY

State of Florida)
) SS: Miette Burnstein, J.
County of Broward)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT

STATE OF FLORIDA, :
Plaintiff, :
vs. : No. 78-381 CF
DENNIS ANTHONY ANNICARO, :
Defendant. :

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Proceedings had and taken before the Honorable Miette Burnstein, one of the judges of said court, at the Broward County Courthouse, commencing at or about 9:00 A.M., Wednesday, July 5, 1978, in the City of Fort Lauderdale, County of Broward, State of Florida, and being Defendant's Motion to Suppress Evidence, pages 3 to 77.

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APPEARANCES:

JEFFERY DRISCOLL, ESQUIRE,
Assistant State Attorney,
appearing on behalf of the State of Florida.

EDWARD KAY, ESQUIRE,
of KAY, RODERMAN & SILBER, P.A.,
appearing on behalf of the defendant.

ROBERT SILBER, ESQUIRE,
of KAY, RODERMAN & SILBER, P.A.,
appearing as co-counsel on behalf of the defendant.

Thereupon, the following proceedings were had:

THE COURT: We're ready on the motion to suppress in the case of State of Florida vs. Dennis Anthony Annicaro, case number 78-381CF, and Mr. Driscoll is here on behalf of the State and Mr. Kay is here on behalf of the defendant. Is the defendant present?

MR. KAY: I don't see him, Your Honor.

THE COURT: You want to have a motion to suppress without him?

MR. KAY: I'm going to have the motion to suppress. We can have the motion to suppress without him. Your Honor, before we proceed I'd like to amend my motion to suppress.

THE COURT: Can I see the file? In what way do you want to amend it?

MR. KAY: I want to allege in the motion to suppress and incorporate in the motion to suppress a copy of an arrest warrant from the State of New Jersey vs. Dennis Annicaro, at the same time allege that under the law as enunciated in Giordenello vs. the United States that the arrest warrant does not allege sufficient factual data to make an arrest and that, therefore, any search made pursuant to the faulty arrest warrant would be illegal.

THE COURT: Give me the citation of the case. Why isn't this certified? What is this?

MR. DRISCOLL: That's an arrest warrant.

THE COURT: Don't they have them under seal?

MR. KAY: Your Honor, I had Mr. Silber check on this because I was quite sure it would turn out this way. I'll get the

case for you. It's a United States Supreme Court case, G-i-o-r-d-e-n-e-l-l-o, Giordenello vs. United States. It says, in effect, that you just can't simply track the language of the statute when you are preparing an arrest warrant and that's what occurred in the case at bar. I think that Mr. Driscoll will —

THE COURT: Jeff, are you familiar with this case that Mr. Kay cites?

MR. DRISCOLL: No, ma'am, I'm not. However, I would suggest to the Court, first, that the amendment is untimely and I'd object to it because I have had no notice of it. I'm walking in here with the motion to suppress this morning, not to argue New Jersey law. I'd also suggest to the Court that I think it would just off the top of my head track the statute in the arrest warrant which is the person to be arrested simply being notified of the charges outstanding against him and the grounds for the arrest. It's not the affidavit and application for the arrest warrant which, of course, sufficiently gives information so that the probable cause can be shown. But as to the warrant itself, I'd object first to the amendment at this time without having a chance to prepare any law on it and, secondly, I object to — I'm sorry — I won't object that I haven't seen Giordenello and right off the top of my head I'm not familiar with it.

THE COURT: Was Giordenello a case where the warrant was served in the same state in which it was prepared?

MR. KAY: No, ma'am.

THE COURT: Different states?

MR. KAY: Yes, ma'am.

THE COURT: Because I'm wondering if the State of Florida officers are required to go behind the warrant and determine exactly what the factual basis for the arrest was.

MR. KAY: May I ask you a question? Correction, Giordenello as I remember it correctly was not a case involving one state from another state but I'd have to look at the case. Be that as it may, when I said amend my motion to suppress, I really don't think I have to amend the motion to suppress because I think that —

THE COURT: I understand your argument. You're saying that if the arrest warrant was improper, then the resulting arrest itself would be improper.

MR. KAY: Yes, ma'am, but there are loads of other grounds also.

THE COURT: Let's have the officers come in and we'll take one step at a time and I'll look up all these things including Giordenello.

Thereupon, the State of Florida, to maintain the issues on its part to be maintained, called as witnesses JOHN LESKIN and RICHARD GREEN, who, being first duly sworn, was examined and testified as follows:

MR. DRISCOLL: You want to invoke the rule?

MR. KAY: We'd like to invoke the rule, Your Honor.

MR. DRISCOLL: We first call Deputy Leskin.

THE COURT: Then the other deputy is advised that the rule has been invoked, if you would wait outside in the hallway till we call you. Please don't discuss your testimony with anyone until we call you.

DIRECT EXAMINATION

BY MR. DRISCOLL:

Q State your name and your occupation for the record, please.

A John Leskin, Deputy Sheriff.

Q And how long have you been employed as deputy

sheriff, Deputy Leskin?

A Eight years.

Q And are you currently assigned to any particular unit with the Sheriff's Office?

A Narcotics Division.

Q How long have you been employed by the Narcotics Division?

A Approximately a year and a half.

Q And were you so employed on January 13, 1978?

A I was.

Q On that date did you have occasion to come into contact with the defendant now known to you as Dennis Annicaro?

A Yes.

Q 167 Northwest 21st Street, Pompano?

A Yes.

Q And approximately what time did that contact come about, sir?

A Approximately six A.M.

Q What was the purpose of your contact?

A I was in possession of an arrest warrant from the State of New Jersey.

Q And who was the arrest warrant for?

A Dennis Annicaro.

MR. DRISCOLL: Do you want this as a defense exhibit?

MR. KAY: State exhibit, defense exhibit, whatever.

Q What was your arrest warrant for, Deputy?

A I believe conspiracy.

Q And who, if anybody, was in your company at the time?

A I'm sorry. I didn't hear you.

Q Who, if anyone, was with you at the time?

A Agent Green, Sergeant Bingham.

Q Anyone else?

A Not that I recall.

Q What did you do upon your arrival at that address?

A I knocked at the front door several times at which time a white male who I recognized this voice as being Dennis Annicaro —

THE COURT: I'm sorry. Pardon me?

THE WITNESS: Who I recognized his voice as Dennis Annicaro stated, "Who's there?" I told him, "It's John from the Sheriff's Department and I got a warrant for you, Dennis."

Q Deputy, I'm going to show you what's been marked State's Exhibit 1 for identification and ask you that if you recognize that.

A Yes.

Q What is that?

A The copy of the warrant that I served.

Q I'm sorry, Mr. Annicaro answered you how?

A He asked who was there. I said, "It's John from the Sheriff's Department, Dennis, I have a warrant for you from New Jersey. Open the door." He said, "Let me get some clothes on and put the dog out."

I said, "No, first open the door." He opened the door. He was holding a Great Dane.

Q How was he dressed?

A White jockey shorts. He said, "Oh, Christ, not again." I said, "Yeah, well, one of those things." He said, "Let me get on a pair of jeans," and I said, "All right."

Myself, Agent Green and Mr. Annicaro then entered the bedroom.

Q For what purpose?

A For my safety, to let him put on a pair of jeans. I didn't want him to go in the bedroom by himself.

Q Why not?

A Why not? We knew that there were several weapons within the residence. We entered the bedroom, waited till he got dressed. We then entered the living room at which time Denns said could he make a phone call, asked me if he could make a phone call. I said sure.

We started to enter the kitchen at which time I believe it was Sergeant Bingham said, "Look on the table." I looked on the kitchen table and observed a small brown vial standing next to a razor blade and mirror.

Q Why did you enter the kitchen?

A That's where the phone is.

Q Was Dennis in the kitchen?

A Yeah.

Q Pardon?

A Yes.

Q Again, why did you go with Dennis to the kitchen?

A For our safety.

Q For the same reason, weapons or something?

A (Affirmative nod.)

MR. KAY: Your Honor —

THE COURT: Maybe we better let him testify a little more.

Q I'm sorry. For what purpose did you accompany Dennis into the kitchen?

A For the purpose of our safety because we knew there were weapons within the house. I then lifted up the vial. I observed a white crystally substance within it. I then told Dennis that I would have to charge him with possession of cocaine.

Q Deputy, you said you've been in narcotics for one and a half years?

A Yes.

Q What training did you have for your work in narcotics?

A I graduated D.E.A. school, several narcotics seminars, and I purchased numerous amounts of illicit drugs.

Q Did you attend the police academy?

A Yes.

Q Is there any training there on the recognition of controlled substances?

A Just slightly.

Q The D.E.A. school, does it concentrate at all on controlled substances?

A Yes.

Q For the record, would you tell the Court what D.E.A. stands for?

A Drug Enforcement Administration.

Q What agency is that?

A Federal government.

Q How long was that seminar?

A That school was eighty hours.

Q It was devoted to what?

A Complete drug recognition of narcotics.

Q Have you ever in your one and a half years as a narcotics officer come into contact with cocaine or PCP?

A Numerous times.

Q And have you ever had it tested, verified that it was, in fact, one of those substances, cocaine or PCP?

A I hand-carried it to the lab for analysis.

MR. KAY: I object on the ground it's not responsive to the question.

THE COURT: Why don't you rephrase the question? I didn't hear the question.

Q Have you ever had it verified that items that you

thought in your previous experience to be cocaine or PCP were, in fact, cocaine or PCP?

A Yes.

Q How was it verified?

A I would take it down to the Broward County chemist for analysis.

Q And would he be the one that would tell you?

A Yes.

Q When you first arrived, how big was the vial?

A Approximately two inches in height.

Q There was a white crystally powder in it?

A Yes.

Q How much of the bottle did the white crystally powder take up?

A I don't recall at this time. I'd have to look at the report.

Q What was located next to it did you say?

A A razor blade and a mirror.

Q From your experience and training, Deputy, did you recognize those to be any particular items or did you believe them to be any particular items?

A Yes, they're commonly used to cut cocaine for snorting.

Q What is snorting? How is cocaine snorted?

A They place it on the mirror. They chop it fine with a razor blade and then inhale it through their nostril through a straw.

Q From your experience and training did you recognize or believe the white crystally substance to be anything?

A I believed it was cocaine.

Q What did you do at this time when you saw that?

A I placed Dennis under arrest for possession.

Q Did he say anything at the time?

A When I said, "Dennis, I'm placing you under arrest

for possession of cocaine," he made the statement saying, "It's not cocaine."

Q What did you do with the warrant that you served on Dennis that day?

A I returned it to the authorities in New Jersey. They were copies.

Q What did you do with the brown vial, the razor blade and the mirror?

A I placed it in my own personal evidence locker until the time that I hand-carried it to the Broward County chemist.

Q What about Mr. Annicaro? What happened?

A We transported him to the Broward County Courthouse and placed him — booked him for possession.

Q Was he allowed to make that phone call?

A Yes.

MR. DRISCOLL: I have no further questions.

CROSS EXAMINATION

BY MR. KAY:

Q Agent Leskin, you didn't know anything about this warrant that you were serving; did you, sir?

A I knew there was a warrant from New Jersey and it was for conspiracy on a wiretap.

Q It was an extradition warrant; was it not?

A I don't recall.

Q How did it get into your hands, sir?

A By my lieutenant.

Q What lieutenant is that?

A Bauers.

Q Don Bauers?

A Yes.

Q And he doesn't do extradition work; does he?

A No.

Q Any particular reason why Bauers had the extradition warrant for Annicaro?

A No.

Q No particular reason at all?

A I wouldn't know.

Q You wouldn't know. In any event Bauers gave it to you when you went and served it on Dennis Annicaro?

A Yes.

Q Correct, and you say you served it around six o'clock in the morning?

A Yes.

Q You knocked on the door?

A Yes.

Q And Annicaro said who's there?

A Yes.

Q And you told him John from the Sheriff's Office?

A Yes.

Q And then he opened the door?

A Yes.

Q Now, when he opened the door you placed him under arrest; did you not?

A Yes.

Q And so that was the end of that; wasn't it?

A Yes.

Q After the arrest had been effectuated, you say he went to the bedroom?

A Yes.

Q When is the first time you saw a brown vial?

A When I first entered the residence, the kitchen light was lit. He had the large dog, large Great Dane by the collar. He started to walk him through the kitchen to place him on

the patio because the dog was barking. He put the dog out. I observed the vial then.

Q You were not inside the kitchen at that time; were you, sir?

A I was standing in the living room.

Q How far from where you were standing in the living room to where you observed the brown vial?

A As far as from me to that gentleman. It's a very small home.

Q Poor person, Now, how far in feet? Would you be able to estimate that?

A Twenty feet.

Q Pardon?

A Fifteen to twenty feet.

Q And what did you do when you observed the vial?

A Nothing at this time.

Q All right, why not?

A Well, I was more concerned with letting Dennis get his clothes on.

Q And so what did you observe about the vial at that time?

A Just that it's sitting on the kitchen table next to a razor blade and mirror.

Q You don't have that vial with you by any chance; do you?

A No.

Q Does your partner have it?

A No.

Q Now, who was in the house with you?

A To the best of my knowledge, Agent Green, Sergeant Bingham and there was one or two other agents.

Q You noticed Bingham was there?

A Yes.

Q And you know Green was there?

A Yes.

Q When did Bingham notice the vial; after you noticed it?

A I'm not sure.

Q Now, you said that inside this vial was a razor blade and a piece of newspaper folded up; isn't that correct?

A Yes.

Q The razor blade was not outside the vial?

A There was one outside the vial also with the mirror.

Q So you're telling me that there was a razor blade with a mirror and then inside the vial you found a razor blade and a newspaper, wrapped up newspaper?

A Yes.

Q You didn't mention that in your report I guess?

MR. DRISCOLL: Object to that, Judge. It's improper.

Q Did you mention it in your report?

MR. KAY: It goes to the credibility, Your Honor.

MR. DRISCOLL: Objection, it's improper impeachment. The lack of an item stated in the report is not grounds for impeachment.

THE COURT: I think Mr. Kay is entitled to ask whether it was in the report.

MR. DRISCOLL: Judge, I object to it. I can bring the case law to the Court's attention. It's improper impeachment, the fact that something is not in the report.

THE COURT: I know the case you're referring to but I don't think that it's for impeachment purposes. I think it's for the determination of whether there was such a thing contained in the report. I think he's entitled to ask it.

MR. DRISCOLL: What is the fact whether or not it's in the report other than impeachment?

THE COURT: I don't know if you are talking about irrelevancy.

Q There was no mention of it in your report; was there?

A I didn't take the mirror.

Q There was no mirror mentioned in your report; was there, John?

A Not to my knowledge. I have to look in my report.

Q And there was no mention about a razor blade being outside the vial; was there?

MR. DRISCOLL: Objection, Judge, same objection. It's improper impeachment.

THE COURT: We're not here with a jury.

Q Was there?

A Not to my knowledge.

Q Well, if it's not to your knowledge then it's not to anybody's knowledge.

A If it's not in my report, it's not in my report.

Q Now, when did the time come when you decided you wanted to investigate that vial?

A When Dennis went to make a phone call.

Q How far was he from the vial at that time?

A Four feet.

Q He couldn't reach and touch the vial; could he?

A As big as Dennis is, possibly, yes.

Q Four feet?

A Yes, Dennis is a big —

Q I know how big Dennis is. What I'm saying, his arms aren't four feet long; are they?

A No, but standing on the phone he could reach over to the table. He was four feet not even.

Q But he'd have to make a movement besides as far as he could reach; wouldn't he?

A Oh, yes.

Q And that's when you decided to investigate further; isn't that correct?

A Yes.

Q And what was your purpose in going over there to investigate further?

A Because I've seen vials like that before.

Q And you had some suspicion; did you not?

A Very much, yes.

Q You were very suspicious?

A Yes.

Q But you didn't know what was in the vial at that time; did you?

A No.

Q And there was no contraband at that time in plain view; was there?

A No.

Q But you were investigating to see if you could find some contraband; isn't that correct?

A within the vial, yes.

Q Within the vial?

A (Affirmative nod.)

Q And then you picked up the vial and you opened the vial up?

A Yes.

Q At that time some contraband came in plain view; did it not?

A Yes.

Q What kind of contraband was that?

A To my knowledge it was cocaine.

Q Well, as it turned out it wasn't cocaine.

A That's what I heard.

Q I mean that's understandable; isn't it?

A No, that's the firs time I ever seen they said it came

back that it was Phencyclidine, PCP, and I've never seen white Phencyclindine.

Q So you were surprised; you are surprised?

A When I heard that this morning, yes.

Q You thought it was cocaine?

A Yes.

Q So Dennis's statement quote that's not cocaine was correct; wasn't it?

A Sure was.

MR. KAY: I have no further questions. Thank you, John.

REDIRECT EXAMINATION

BY MR. DRISCOLL:

Q Deputy, Mr. Kay asked you about what you said when you knocked on the door and I believe your reply was something like it's John from the Sheriff's Office?

A Yes.

Q And have you ever met Dennis Annicaro before? You also testified about his height and reach.

A Yes.

Q How much prior to this had you met Dennis?

MR. KAY: I object to the relevancy, Your Honor.

THE COURT: Overruled.

Q How much prior had you met Dennis?

A Approximately three weeks to a month.

Q And what were the circumatances of that meeting?

MR. KAY: I object to the relevancy, Your Honor.

THE COURT: Well, I'm going to overrule the objection because to tell you the truth I was wondering about that myself, whether that added to the viewing of a vial and would indicate reasons or grounds for the officer having a suspicion.

MR. KAY: Well, if we agree it's suspicion, it's still irrelevant, Your Honor. I don't have any objection to the Court listening to it. Let Mr. Lesink tell the gory details.

Q What was the basis of that prior meeting?

A I arrested him for possession of eleven ounces of cocaine.

Q When you first saw this vial I believe you told Mr. Kay that it was when you first entered the living room; is that correct?

A Yes, while he was putting the dog outside.

Q And you were fifteen to twenty feet away?

A Yes.

Q When was the first time that you observed what was inside the vial?

A When I opened it up.

Q What about prior to that?

MR. KAY: I object, Your Honor. He got the answer. He doesn't like the answer he got. Now he asked the same question again.

MR. DRISCOLL: I'm going to ask him what about prior, what did you see. That's a different question.

MR. KAY: I object.

THE COURT: Overruled, go ahead.

A Just something folded up within the vial.

THE COURT: Something folded up inside the vial?

MR. DRISCOLL: Yes, ma'am.

THE WITNESS: Yes.

THE COURT: This was observable from outside the vial?

THE WITNESS: Yes.

Q Prior to opening the vial could you see the other razor blade and the mirror?

A Yes.

Q What significance would a brown vial by itself with a razor blade and mirror have to you?

MR. KAY: That is for the Court to determine, not for Mr. Leskin to determine.

THE COURT: Maybe he can educate me.

MR. KAY: I don't mind educating after the motion is over, Judge. It's only my point being that this police officer testified candidly and truthfully that he didn't know what was inside the vial till he opened it up and I don't see the relevance of all those other things.

THE COURT: I think the relevance would be whether there was any cause for him to —

MR. KAY: Open it up?

THE COURT: To think that it might give him probable cause to believe that it might contain some contraband.

MR. KAY: Okay.

A In my past, vials are commonly-used containers to hold illicit drugs, illicit narcotics.

Q Does the presence of a mirror and razor blade hold any significance to you?

A Yes, the mirror and razor blade is always used to cut cocaine down finer so it could be inhaled.

THE COURT: How is that accomplished?

Q How is that done?

A They'll sprinkle it on the mirror and with the razor blade chop it numerous times making a line, small thin line. They also cut a McDonald's straw with the razor blade approximately two inches in height. They lean over the mirror, hold one nostril placing the straw up the other nostril and inhaling the line of whatever drug may be on the mirror.

THE COURT: Does one do that with PCP, too?

THE WITNESS: Yes.

THE COURT: That's quite an education. Go ahead.

Q Mr. Kay asked you about an extradition warrant. Do you know what sort of warrant this is or the warrant that you served on Dennis Annicaro?

A Yes, that was conspiracy for I believe part of their wiretap.

Q Other than being a police officer, are you a trained lawyer in any way?

A No.

Q Do you know for a fact that's an extradition warrant versus an arrest warrant?

A All I know is it was an arrest warrant.

Q Have you ever seen a warrant like that before?

A No, not like that, no.

Q Is there anything unusual in your serving that warrant?

A No.

Q Have you ever served arrest warrants before?

A Yes.

Q And you stated you did know Dennis Annicaro?

A Yes.

MR. DRISCOLL: Nothing else.

RECROSS EXAMINATION

BY MR. KAY:

Q It really was unusual for you to serve a warrant like that; wasn't it?

A Not under the circumstances, no.

Q What are the circumstances?

A Well, the circumstances were that I arrested Dennis

in the past and we had a pretty good rapport between us.

Q I guess you did. As a matter of fact, they gave you the extradition warrant because you knew about Annicaro or were investigating him; isn't that right?

A Yes.

Q And just to reiterate what you said before, before you opened up the vial there was no contraband in plain view; was there?

A That's correct. There was not.

Q And the first time that you observed any contraband in plain view was when you opened the vial up?

A Yes.

MR. KAY: That's all I have, Your Honor.

MR. DRISCOLL: I have nothing else, Judge.

MR. KAY: One other question, John. Between the time when you saw the vial and now, have you ever attempted or did you ever attempt to get a search warrant?

THE WITNESS: No.

MR. KAY: That's all. Thank you, John.

THE COURT: Wait, wait. Was there anybody else living in the house at that time?

THE WITNESS: Not living there. There was a girl staying there, girlfriend.

THE COURT: There was someone who had access to the house?

access to the house?

THE WITNESS: Yes, there was a girl there.

MR. KAY: Thanks, Sheriff. That's all.

MR. DRISCOLL: Judge, if I could have a second, I think I have another deputy on call but I think the testimony would mostly be cumulative and I'd save the Court some time.

Judge, it appears the testimony would be cumulative. If the Court would like to hear it —

THE COURT: I tell you where my problem is and then maybe you can limit the argument to the point where I'm having some difficulty. I have a feeling that even if it was not a proper warrant that it at least would be given by the police officer the presumption of validity.

MR. KAY: Cause to be there at that time.

THE COURT: Right, he had an appropriate reason to be there. He didn't just walk in. Even if it was improper, I think that's probably something you're going to have to argue with regard to the warrant itself. So once inside the residence, obviously what is in plain view is subject to seizure.

Now, what I have a problem with is what was in plain view. Obviously the brown vial is in plain view. The brown vial in and of itself is not suspicious quote unquote. Then you have to add together these other things. Number one, the officer testified that coke was commonly kept in this type of vial; secondly, that the police officer testified that he had previously arrested the defendant for coke possession; and thirdly, that he observed a razor blade and mirror commonly used to cut coke and PCP.

Now, by adding these three things up, what I'm trying to determine was was there sufficient probable cause to open the vial, and because of the fact that it's small and easily disposable, I don't think you would have had the opportunity to have gotten the proper search warrant in view of the fact that there were other people with access to the house.

MR. KAY: First of all, Your Honor, the only way that this search I believe can stand up is under the plain view doctrine which really is enunciating Coolidge vs. New Hampshire which is some very, very clear views as far as plain view is concerned. But the validity of the seizure can

only be justified that way because it's obviously not pursuant to a valid arrest because of the limitation placed on us by Chimel vs. California which says that when somebody is arrested you can only search — in other words, the point being looking for weapons.

So it's not pursuant to a valid arrest. It's not pursuant to a search warrant. It's not pursuant to an emergency. This is what Your Honor was talking about before.

Coolidge vs. New Hampshire, Your Honor, which is a cruel terrible murder case which occurred in New Hampshire was a situation where police officers were looking for a car, were looking for evidence inside a car, and they looked inside the car and they claim that they saw something in plain view and, therefore, they seized it. The Supreme Court held, no, the plain view must be inadvertent and the Supreme Court pointed out that there was no reason in the world, and it happens all the time, why police officers cannot stop — let's stop right htere, Dennis. You're going to sit right there and we're going to get a search warrant because we have probable cause to believe that there are narcotics in your house.

Now, initially, Your Honor has to ask yourself — they go to Judge Burnstein and they say, "Judge, these are the facts. Do you want to issue a search warrant for this?" That's sort of the point we're getting at. So they didn't do that. Instead what they've really done here, Judge, is that they have substituted their judgment for the judgment of an impartial magistrate by seizing the thing in plain view.

Now, plain view requires, Your Honor, requires not just suspicion. Plain view requires that the police officers be in the proper place, that it be inadvertent and the police officer recognizes this contraband. Now, Bob has a couple of cases on that.

MR. DRISCOLL: Can I reply, Judge, if you have no objections?

Judge, plain view does not require that it be inadvertent. I believe that Mr. Kay is misconstruing the facts of Coolidge vs. New Hampshire. Coolidge vs. New Hampshire was a search of the house down to the car parked in the driveway that there was no warrant for and they went there. The Court talkd about the inadvertency of plain view. If they had inadvertently fallen across something in the house, not to go out and search the house. There's a distinction there.

MR. KAY: I will waive the entire motion to suppress on the grounds that Coolidge vs. New Hampshire requires that plain view be inadvertent.

THE COURT: What's the cite for Coolidge? I'll look at it myself.

MR. KAY: 411 United States something or other. I'll get that but —

MR. DRISCOLL: I don't think there's any dispute to the fact that there's a warrant, that Deputy Leskin had the right to be standing where he was standing in the company of Mr. Annicaro for his own protection. The State is not arguing that the search of the vial is a search incident to an arrest. It's simply a search based on plain view.

Deputy Leskin was an experienced narcotics officer. He's been working narcotics for a year and a half, made numerous buys of PCP and cocaine, been to numerous seminars, police academy. When he sees a small brown vial knowing thast the person he's arresting in that house has been arrested for possession of eleven ounces of cocaine, the vial in the company of a razor blade and a mirror, that he has probable cause to believe that vial contains contraband and he has the right to open that bottle, when he opens it,

evidences that there is what he thinks ast that time to be cocaine, but as Dennis Grey and Mr. Annicaro told him, it's not cocaine, it's PCP, I think the probable cause will stand on the facts, Judge. I don't think there has to be any inadvertent sighting of anything where an officer has legal right to be.

MR. KAY: I think we're tossing probable cause into plain view and sort of mixing them up as if they were together. They're not together. Plain view is exactly what it means. When you see contraband in plain view, it doesn't mean you have probable cause to think it's contraband. That means that you know it's contraband.

THE COURT: You may be right because I am putting them together and maybe they should be separated. I don't know.

MR. DRISCOLL: To know it's contraband is to have probable cause to believe it's contraband. I mean he can't know it's contraband. He can't know that marijuana in an open field is marijuana till he's run a test on it to know that. That is plain view. Plain view requires only that the officer have a legal stand where he is, not inadvertence.

THE COURT: Go ahead, Bob.

MR. SILBER: I just want to cite a few cases for our proposition. The first case is Carr vs. State, a recent casse out of the Second D.C.A., 353 So. 2d 958.

THE COURT: 353 what?

MR. SILBER: 353 So. 2d 958 cited in January and that involved a situation where there was some marijuana.

THE COURT: You're not talking about the twisted cigarettes; are you?

MR. SILBER: That's it. The Court there said, Judge, that the officer stated when he saw to cigarettes to the window —

THE COURT: I tell you the truth. I don't understand that case either.

MR. KAY: Well, Judge, you gotta start understanding these cases.

THE COURT: I mean when I read that it blew my mind. I kept thinking what else could it be.

MR. KAY: That's the law though.

MR. SILBER: I think you understand. You might not agree with it. I'm sure you understand it. But the Second D.C.A. said, Judge, that the officer saw two cigarettes through the window that he knew were marijuana cigarettes because they were unevenly rolled and twisted at the end. Actually he could not see any marijuana. On the basis of this evidence and the stipulated statement of facts, the trial court found the seizures of the marijuana cigarettes proper.

The Second D.C.A. disagreed. They stated as to the test for probable cause, the test to determine probable cause is whether the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the blief that an offense had been committed.

THE COURT: I know that and that's exactly where I am with this case. Does an officer, knowing that the defendant has previously been arrested for coke possession, that coke is commonly kept in a brown vial of this type and that a razor blade and mirror which were seen next to the vial which are commonly used to cut coke, that's exactly what I'm determining. Is it reasonable to believe that this is coke?

MR. SILBER: Number one, Judge, a razar is not contraband. A vial is not contraband, only the contents. Now, the officer testified —

MR. DRISCOLL: Mirror also. I'll stipulate to all that.

MR. SILBER: And the mirror is not contraband. I mean I use a razor blade to shave every day and a mirror also.

Maybe this gave some suspicion to him because it seems like police officers have a propensity to go into little vials and little pill holders and any small box.

THE COURT: Can I take that as an admission from a former police officer?

MR. SILBER: That's right, Judge. They like to look at things. It arouses their curiosity.

In the Carr case the Court based their holding there that there was no contraband in plain view, merely the two cigrettes, and it's right on point with our case because there is no contraband in plain view. The officer testified that he had to go into the vial to determine what there was in it and then when he got there, in his great experience it wasn't even what he thought it was.

THE COURT: Let me ask you something, Bob. If you patted down somebody incident to a lawful arrest and he came up with two marijuana cigarettes in his pocket, are you saying that the rolled-up cigarettes in his pocket are not sufficient to test for marijuana because they're contained within the cigarette wrapper?

MR. SILBER: It's a different situation, Judge. We're talking about a plain view situation here as was the Carr case.

Now, if you arrest somebody, then incident to a lawful arrest you can search obviously and I think that presents a different situation. But when it's not on his person and the only exception under the constitution, the United States Constitution, the Florida Constitution, the laws of the United States and the laws of Florida, the only exception to a search warrant that would fit these circumstances is the plain

view doctrine which just does not fit because he said, "I didn't know what was in it till I looked in it".

THE COURT: The only thing that bothers me and I wonder how you can get around it, is an officer supposed to be blind, deaf and dumb and not pay attention to something that he sees?

MR. KAY: No, why didn't he just say. "Stay right here. I'm going to get a search warrant." I guarantee that Judge Burnstein or Judge Lasher or Judge Futch is not going to give a search warrant based upon what Leskin said but that's besides the point.

MR. DRISCOLL: Judge, he doesn't need a search warrant. The items are under plain view.

MR. SILBER: Judge, if I may continue with these cases, let me cite Miller vs. State, 137 So. 2d 21, Second D.C.A. case, 1962.

THE COURT: Second D.C.A.

MR. SILBER: The Miller case, Judge, stands for the proposition that doubt as to whether a police officer was reasonable in concluding that a search was justified must be resolved in favor of the defendant whose property was searched.

Another case is Brown vs. State, 330 So. 2d 861, Fourth D.C.A. case, 1976 which stands for the proposition, as the Court well knows, that probable cause cannot be based on mere suspicion but must be based on facts known to exist. Harris vs. State —

THE COURT: Wait a minute, now you're confusing probable cause, too. According to Mr. Kay, we're not supposed to be confusing probable cause —

MR. KAY: What Mr. Silber is talking about is the Court may be in doubt and the doubt under the Miller case must be resolved in favor of the defendant.

THE COURT: I have no question in my mind whatsoever that there's strong suspicion. What I'm wondering is whether that strong suspicion is strong enough to be called probable cause.

MR. SILBER: That's why I cited the Brown case, Judge. Harris vs. State, 352 So. 2d 1269, Second D.C.A., 1977, the fact that an officer saw the defendant put a rolled-up clear plastic bag in his pocket did not constitute probable cause to arrest. The fact that the officer knew that marijuana was commonly carried in the plastic bags gave rise to, at most, a mere suspicion that the bag contained marijuana.

THE COURT: Fine, and if all we had was that the coke was commonly kept in this type of brown vial, then that would be applicable. I think we have a little more than just the description of the vial.

MR. SILBER: Judge, I think we have a similar circumstance as in the Harris case that I just cited in that he had a suspicion that there was something in it. He said on the stand that he couldn't say what was in it till he went and looked in it.

THE COURT: But I think here you have something somewhat more articulable than that.

MR. KAY: Your Honor, here's what it comes down to. This is why I say something about probable cause. See, most of these cases that come down, the ones that Bob is talking about, does this give probable cause to arrest somebody, you see. A guy is walking around with a clear plastic envelope. Does that give the policeman probable c ause to arrest him and, therefore, via the search be legal or something like this.

Here though we're not dealing with probable cause. We're dealing with only the way Mr. Driscoll stated on the record, the only way this search can be justified under the

plain view doctrine. So we've got to get ourselves educated as to what the plain view doctrine talks about.

The plain view doctrine talks about the following: That a police officer, if he has a legal right to be where he is which, of course, we have not really determined yet, but for the sake of argument that occurs, if he has a right to be where he is and he sees contraband inadvertently he is allowed to seize same. That's what the plain view doctrine stands for.

Here is a police officer who says there's an awful lot of suspicion but he didn't see contraband. So therefore that doesn't fall within the plain view doctrine and that's the difference between all these cases that have been cited. Plain view doctrine is not a police officer who has the right to be where he has the right to be and who has probable cause to believe that something that he sees is contraband has the right to seize it. That's not the plain view doctrine.

I just asked my associate to go get the book so we can find out exactly what the plain view doctrine is and I think when you see what the plain view doctrine is, Judge, you'll see that it's not a question. The test is not probable cause to believe it's contraband as Mr. Driscoll would like you to think with the mirror and razor and all the other things. The police officer must testify that he knows it's contraband.

The case with the marijuana cigarettes, if you remember correctly, the police officer said he knew that was marijuana cigarettes. Okay, that puts him in the plain view doctrine. But probable cause, that's a whole different story because, as I pointed out before, if he thought he had probable cause he simply goes out and tries to get a search warrant. So I think that's where our differentiation occurs.

MR. DRISCOLL: Judge, plain view doctrine, Ashby vs. State —

THE COURT: Where is that?

MR. DRISCOLL: Ashby vs. State, Your Honor. I don't have the cite.

THE COURT: You keep giving me cases without the cites.

MR. DRISCOLL: Eddie has the cite on Ashby.

MR. KAY: That's a case we're going to take it up on. That's the case that stands for the proposition that if the Court rules adversely on a motion to suppress we can reserve our rights to appeal and take it up on appeal. You've heard that case.

THE COURT: Okay, go ahead.

MR. DRISCOLL: If that makes you feel any better about ruling one way or the other.

THE COURT: It does, It makes me want to deny it.

MR. DRISCOLL: Ashby vs. State is a case where police officers in a street in a yard observed through a window items they believed to be stolen property. There'd been a tip on them. They then also saw through a crack in a garage door more items that they believed to be stolen property. They did not know them to be stolen property.

The Court in Ashby vs. State says that those officers have probable cause to believe that those boat motors and a boat were stolen properties and therefore had the right to enter since they were already legally where they could be and they could go in and seize it.

What we have here is almost an identical situation in that legally being where he is, he has a right to seize that when he has probable cause to believe it is contraband and that's what we have. I would dispute the inadvertence.

MR. KAY: We're both advocates and we have different viewpoints.

THE COURT: Can I read 411 which is supposed to be Coolidge?

MR. KAY: If Your Honor could wait about three minutes, I'll get my book with all the cites. Why don't we take arecess for five, ten minutes?

MR. DRISCOLL: I'd be happy to give the Court the case law that says inadvertence is not required.

THE COURT: We'll give you twelve minutes.

MR. KAY: Swell, Judge.

THE COURT: You know where it is that I have problems so don't give me a whole lot of stuff on other things; all right?

MR. DRISCOLL: I'll get the right case law.

(Thereupon, a short recess was taken.)

THE COURT: Jeff, did you have something?

MR. DRISCOLL: Yes, ma'am, I have Ashby vs. State.

THE COURT: Who?

MR. DRISCOLL: Ashby vs. State.

THE COURT: Let me look at that. That one I haven't seen yet. If you have a photocopy of that, show me that.

MR. DRISCOLL: I just want to direct Your Honor's attention to page 227 quoting State vs. parnell from the Florida Supreme Court of 1969. The Court quotes from Parnell: "It is well settled that when an officer, while engaged in performing his lawful duties, observes contraband items or goods that he has probable cause to believe are stolen, such goods may be seized without a search warrant and are admissible in evidence," and that was the argument.

MR. KAY: I'd like to call your attention to one paragraph here. "The principle is fundamental in the Parnell decision that a search and a seizure are separate and distinct legal actions. A search is generally accepted to be an

inspection or examination of places closed from public or general view, and requires some measure of force or intrusion. A seizure is the act of taking custody of evidence or contraband."

I think from a reading of Coolidge you'll see that plain view envision seizure. It doesn't envision search.

THE COURT: I've read bits and pieces of Coolidge because it's very lengthy and I haven't had an opportunity to read the whole thing. I may be wrong again but in measuring probable cause I am using the standard of probable cause plus exigency quote unquote.

MR. KAY: Exigency I think Coolidge allows. In fact, may I see that Coolidge case?

THE COURT: Sure. I think with regard to this matter it's a seizure of something that they have probable cause to believe contains contraband.

MR. KAY: First of all, the limits of the doctrine are implicit in the statements of its rationale, the first of these that plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above that no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.

THE COURT: Well, probable cause plus exigency.

MR. KAY: Right, no, well, plain view plus exigency. Contraband belonging to a criminal suspect may establish the fullest possible measure of probable cause, but even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that police may not enter and make a warrantless seizure. The second limitation to discovery of evidence in plain view must be inadvertent. The rationale of the exception to the warrant

requirement as just stated is that a plain view seizure will not turn an initially valid and therefore limited search into a general one. While the inconvenience of procuring a warrant to cover inadvertent discovery is great, but where the discovery is anticipated where the police know in advance the location of the evidence and intend to seize it, just like we have here in this case, requirement of warrant to seize imposes no inconvenience, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as per se unreasonable in the absence of exigent circumstances.

Now, furthermore, even if police had probable cause to search the defendant's automobile parked in his driveway so that even if police had probable cause to search that vehicle where they had known for some time the probable role of the automobile in the crime, defendant was arrested in his house and there was no way in which he could have conceivably gained access to the automobile after the police arrived on his property, warrantless search of the automobile at the stationhouse was not justified on the theory that merely because an automobile was involved, it was not practicable to secure a warrant.

That was one way that the government tried to get around this case here.

MR. DRISCOLL: Judge, I think what Mr. Kay is saying is that Deputy Sheriff Leskin when he went to the house to serve the warrant knew that there was going to be a vial that he indicated was probably two to three inches tall sitting on a kitchen table. If he is saying that this discovery is anything other than inadvertent, then I'm misunderstanding.

MR. KAY: Your Honor, I'm saying that when he saw the vial, he said he was very suspicious. I think we're all missing the point here. He conducted a search first of the vial before he found —

THE COURT: MNr. Kay's point is he feels that the search did not occur until the top of the bottle was open and it was the contents of the subject of the seizure and not the vial itself.

Well, I tell you. This is from the standpoint of legal principles probably as good a case as you can think of to take up because I'm going to deny the motion to suppress.

Do you want to go on at this point or what?

MR. KAY: Your Honor is not going to read the rest of the Coolidge case.

THE COURT: I have in bits and pieces and I tell you what I will do if you like. Some time during the next day or two, I will read it and I will do more thorough research. I've only had a half hour to research it and certainly it's always subject to my lack of knowledge in this particular area and I'm always ready to learn and I'm always ready to do more research.

MR. KAY: The Court realizing the State can take an appeal as well as for the defendant can take an appeal.

THE COURT: No, I was kidding before when I said in that case. No, I really was kidding. I can't really rule with one eye to what the Fourth District is going to do and with one eye toward what's going to happen. I have to call it the way I see it and let the chips fall the way they may.

MR. KAY: The Court is denying the motion to suppress. Can you give me reasons for it?

THE COURT: Well, if you want. I think most of my reasons really have been on the record. I've already indicated that I felt that we require probable cause plus exigency and I think I've indicated that the vial could have been removed by the other occupant of the dwelling and that it was important to take something that could be easily and readily destroyed.

MR. KAY: Does the Court want to say for the record bring in the other officer to say how many officers were in the house?

MR. DRISCOLL: The deputy testified to that, Judge.

MR. KAY: All right.

MR. DRISCOLL: Three police officers in the house.

MR. KAY: The next thing about it is the sufficiency of the arrest warrant.

THE COURT: Now, that case I haven't read at all, the one you just cited to me. The only thing that I have a feeling should be, if it isn't, I don't know anything about the particular law that you have cited, but it just seems to me that if the police officer believed that he was serving a proper and appropriate warrant or an extradition and, in fact, there turns out to be something deficient or something incorrect subseuently, that's something which you raise in a motion to suppress the extradition and not the policeman's justifiable right to be inside the house. Now, maybe that's something that I need to do more research on too but I'm not aware of anything other than the law as I've stated it.

Now, what are we going to do from here?

MR. KAY: We're going to waive jury, Your Honor, My only problem is I don't know where the defendant is.

THE COURT: You're going to waive a jury?

MR. KAY: Yes, ma'am.

THE COURT: The State never does.

MR. DRISCOLL: Judge, my problem is that I dismissed the officer, Deputy Leskin, assuming we'd pick a jury and we'd start later in the afternoon tomorrow morning on the actual testimony. Because we had been set for a different standby system, that's how I understood it. In other

words, I could not be prepared to go non-jury at this particular moment. I'd have to get a hold of Deputy Leskin and get him back in.

THE COURT: Are you willing to waive a jury?

MR. DRISCOLL: I'm just telling the Court that I can't right now not waive jury and I don't know that I'm willing to waive jury. I don't think that I am.

MR. KAY: Well, I'll go jury then. We'll pick a jury. The only thing is could I have five minutes to round up my client?

THE COURT: It will take fifteen minutes before the jury panel gets up here anyway.

(Thereupon, a short recess was taken.)

MR. SILBER: Our motion to suppress was in two parts. We had an argument as to the sufficiency of the warrant.

THE COURT: Right, I had indicated and, again, I may be wrong but I have felt that if there was a warrant that on its face appears to be proper that the police officer is authorized to at least be in the place where he is. Now, with regard to challenging the sufficiency of the warrant, I think you probably are going to have to do that in the court that issued it if there's something improper about it, but I think the police officer had a reasonable ground to believe that it was a warrant to be appropriately served. I don't know. Is there some law on that, too? Otherwise we put the police officers in a position where they have to be trained lawyers to examine these to make sure they're in the right place at the right time doing the right thing and I think if on its face it appears okay that the police officer has a right to be where he is and serve it.

MR. SILBER: I understand what you're saying.

MR. DRISCOLL: Judge, would the Court excuse me?

THE COURT: Sure.

(Thereupon, the luncheon recess was taken after which the following proceedings were had at 1:00 P.M.)

THE COURT: Sue, we are here resuming the trial quote unquote of — what's the defendant's name;